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THE RECORD
OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

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Association Activities

AT THE ANNUAL MEETING of the Association, held on May 8, the following officers and members of Committees were elected:

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Interim reports were received from the Committee on Grievances, John B. Marsh, Chairman, and the Committee on Courts of Superior Jurisdiction, Albert R. Connelly, Chairman. The report of the Committee on Real Property Law, on the imposition of federal control of rents in New York State, presented by its Chairman, Lewis M. Isaacs, Jr., was approved.

THE ROYAL Commission on Capital Punishment, which is holding hearings in several cities in this country, was entertained at dinner by the Association in May. The Chairman of the Commission is Sir Ernest Gowers. The membership of the Commission includes Sir Alexander Maxwell, Mrs. A. C. Cameron, Mr. N. R. Fox-Andrews, Professor Leon Radzinowicz, Dr. Eliot Slater, Mr. Horace Macdonald, and Mr. Francis Graham-Harrison.

AT THE SIXTH ANNUAL Art Exhibition sponsored by the Committee on Art, Samuel A. Berger, Chairman, oil paintings and watercolors were exhibited by some thirty-five members of the Association, and there was a total of over ninety pictures. The opening of the exhibit was attended by a large number of members and their friends. Wilberforce Sully, Jr., was Chairman

of the subcommittee in charge of the show, and Robert Beverly Hale, Associate Curator of American Art for the Metropolitan Museum of Art, acted as consultant to the Committee.

THE COMMITTEE on Foreign Law, Dudley B. Bonsal, Chairman, and the Committee on International Law, A. A. Berle, Jr., Chairman, entertained the lawyer members of the permanent delegations to the United Nations. Mr. Ivan S. Kerno, Assistant Secretary General, headed the delegation. Later in the year the two committees plan to hold a series of lectures for lawyers on the staff of the United Nations.

ON MAY 22 Mr. Roger Greene, President of the Incorporated Law Society of Ireland, was a guest of the Association and a reception was held in his honor. Mr. Garth Healy, the Consul General of Ireland, was also present.

SIR GLADWYN JEBB, Permanent United Kingdom Representative to the United Nations, delivered the final lecture in the series of lectures sponsored by the Committee on Post-Admission Legal Education, Ralph M. Carson, Chairman. Sir Gladwyn spoke before a large audience on "The United Nations: The New Diplomacy."

THE COMMITTEE on Admiralty, J. Newton Nash, Chairman, has approved the proposed amendment to the Ship Mortgage Act, dealing with enforcement and priority of foreign ship mortgages. The Committee also has under consideration the report dealing with proposed legislation affecting government war risk insurance and the admissibility of testimony on examination before trial under the new Admiralty Rule 46 of the Southern District.

The Committee is continuing its study of the amendments to the General Admiralty Rules.

THE COMMITTEE on Aeronautics, Harper Woodward, Chairman, sponsored in May a lecture by The Honorable Thomas K. Finletter, Secretary of the Air Force. Preceding Mr. Finletter's lecture, he was entertained at a buffet supper.

THE COMMITTEE on Foreign Law, Dudley B. Bonsal, Chairman, has received inquiries as to whether the report on the Trading With the Enemy Act of 1917, which was published in the May number of THE RECORD, had been approved by the Committee. The report was approved by the full Committee.

IN APRIL the President of the Association held a dinner in honor of João Neves da Fontoura, Minister of Foreign Affairs of Brazil. Accompanying the Foreign Minister were Santiago Dantes, Counselor to Minister of Foreign Affairs, and Berenguer Cesar, Consul General in New York. Senor Fontoura's remarks at the dinner are published elsewhere in this number of THE RECORD.

THE COMMITTEE on Criminal Courts, Law and Procedure, John W. Burke, Jr., Chairman, joined with the Criminal Courts Committee of the New York County Lawyers' Association in holding the annual dinner meeting of the two Committees at the House of the Association in May.

A COORDINATING committee of New York City Bar Associations was organized in April. Representatives from the following associations were present: Bronx County Bar Association, Brooklyn

Bar Association, New York County Lawyers' Association, Queens County Bar Association, Richmond County Bar Association, and The Association of the Bar. Julius Applebaum, President of the Brooklyn Bar Association, was elected Chairman of the Committee and the Executive Secretary of the Association, Secretary.

The Calendar of the Association for June

(As of May 25, 1951)

June 4 Dinner Meeting of Committee on Federal Legislation

June 5 Meeting of Executive Committee

June 6 Meeting of Joint Committee on Lawyers' Placement Bureau

June 7 Dinner Meeting of Committee on Trade Regulation and Trade-Marks

June 11 Dinner Meeting of Committee on Professional Ethics

June 12 Meeting of House Committee
Meeting of Special Committee on Broadcasting

June 25 *Adjourned Annual Meeting of Association, 4:45 P.M.*

The Contribution of Judge Irving Lehman to the Development of the Law

By Edmund H. Lewis

Associate Judge, Court of Appeals of the State of New York

THE TENTH ANNUAL BENJAMIN N. CARDOZO LECTURE DELIVERED BEFORE THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK ON APRIL 24, 1951

"There is much to commend the institution of an annual namesake Lecture as a means of keeping fresh among us the memory of our departed masters." Those words by Lord Macmillan, spoken at a memorial lecture he gave at Cambridge University in 1935,[1] have a peculiar application to the lectures which this Association founded in 1940. However, when the honor comes to a man to deliver a memorial lecture, he senses at once how impossible it is to produce something worthy of the one memorialized. That is particularly true this evening when the chosen speaker has in mind not only those qualities which make the memory of Judge Cardozo a precious heritage for each of us, but the fact should be added that your speaker has a lively sense of the high standard set by those men who have delivered the nine preceding lectures. As each of those men was a distinguished leader of thought in the field of law, there is comfort for me in the fact that even they found difficult the choice of a fitting subject.

Mindful that the first lecture was by Chief Judge Irving Lehman[2] who gave us those intimate details of Judge Cardozo's life which only a close friend could know, I realized at once that I would mar a masterpiece if I attempted to continue that subject.

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[1] Macmillan, *Law and Other Things. Law and Politics*, p. 1 (1935).

[2] Lehman, First Cardozo Lecture, *The Influence of Judge Cardozo on the Common Law* (1942).

In my quest there came to mind the subject I have chosen, which I am bold enough to think would have commended itself to him whom this lectureship commemorates. In making that statement I note the fact—given to us by Professor Arthur Lehman Goodhart in the seventh of these lectures—that "The friendship that bound Benjamin Cardozo and Irving Lehman together was such an essential part of both their lives that it is difficult to remember the one without thinking of the other."[3]

Indeed our subject was foreshadowed by a statement made in the fifth of these lectures delivered in 1945 by Judge Charles E. Clark when he said—"The level (of these addresses) was set on an upper plateau by the first (lecture), where our dear friend Chief Judge Lehman paid his superb tribute to his intimate associate of so many years. How alike were these two great men, not only in superb qualification for the judicial task, but in human sympathy and understanding as well!" Referring again to Judge Lehman, Judge Clark said—"May it not be hoped that these yearly memorial addresses may stand somewhat at least as a reminder and remembrance also of our dear friend so recently gone who stood so close in life to the kindred spirit in whose name the lectures are given!"[4]

It is now more than five years since that day in October, 1945 when the strife of litigation and the echoes of argument in the Court of Appeals were muted and eulogies were heard in commendation of the character and public service of Irving Lehman whose death had occurred on September 21st of that year. The permanent record of that gathering[5] containing, as it does, eulogies by long-time friends of Judge Lehman and a response

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[3] Goodhart, Seventh Cardozo Lecture, *English Contributions to the Philosophy of Law* (1949) p. 11.

[4] Clark, *State Law in the Federal Court: The Brooding Omnipresence of Erie v. Tompkins.* (1945) Fifth Annual Benjamin N. Cardozo Lecture, Yale Law Journal, Vol. 55, p. 267.

[5] At memorial exercises held in the Court of Appeals Hall on October 23, 1945, Judge Charles B. Sears, Justice Joseph M. Proskauer and Attorney General Nathaniel L. Goldstein spoke for the Bar and Chief Judge John T. Loughran responded for the Court of Appeals. See 294 N. Y. pp. VII–XIV.

for the Court by Chief Judge Loughran, gives us a word picture of the man to whom our minds turn tonight. He was then described as an earnest seeker after truth, a leader of men in the causes of philanthrophy and religion, a lover of and a believer in his fellow men, a lawyer's judge who knew his precedents not as mere dry technicalities but as significant milestones on the long and arduous path by which the law seeks to reach unerring justice; a judge who fearlessly found the facts and inexoribly applied them to the law.

Since the passing of Judge Lehman enough time has elapsed to enable us to appraise the contribution he made as a judicial officer to the life of his time. In making that appraisal we shall find him not only a legal scholar of first rank, but, as we shall see, a great humanitarian who was natively endowed with those inner resources which enabled him to put those two qualities to use in the cause of justice.

Omitting biographical data, and in an effort to keep within the limited scope of my subject, it may be enough to say that Irving Lehman's election to the Court of Appeals in November, 1923, brought to that Court a man then forty-eight years of age whose native ability was of the best, whose education at Columbia University in the arts and in the law had demonstrated his high qualifications for professional work and his own earnest purpose to make the law his vocation; a man whose experience of ten years as a practicing attorney in New York City had given him that acquaintance with problems common to the day's work in a busy law office, which experience is so valuable to a judicial officer; a man whose service for fifteen years—from 1909 to 1924—as a Justice of the Supreme Court had proven him qualified to a high degree for service on an appellate court.

Having in mind that the advent of a junior judge upon an appellate court is quite naturally followed by a period of adjustment for the newcomer and for the court itself, I shall recast for you the scene at Albany upon which Judge Lehman entered on January 7, 1924, and then attempt to recapture the atmosphere

which then prevailed in the Court. First I give you Judge Lehman's own appraisal of the Court as it was then constituted.[8] He tells us—"A group of judges of notable distinction was gathered around the conference table when I first saw it. Frank H. Hiscock, the chief judge, presided there. His associates sitting about the table were, in the order of seniority, Cardozo, Pound, McLaughlin, Crane and Andrews. All of them had been elected to the Court of Appeals after long and distinguished service in the Supreme Court of the State. All were men of marked independence of thought, and their views on social and political problems varied widely. No man, however great, no judge, however learned, could dominate the discussions of that group, but in those discussions Judge Cardozo wielded a mighty influence. Upon one matter, and only one matter, there was firm agreement among the members of the Court. Each judge was sure that all his associates were men of unquestionable sincerity and honesty of purpose and of great ability. The discussions might at times become warm, for until convinced, each judge tried hard to show his associates the error of their ways; but no discussion ever diminished the respect of each judge for his fellows."

As to what might be termed the judicial predilections then prevalent in the Court I am able to give you a statement by Judge Cuthbert W. Pound, as he then was, made in an address delivered, as it happens, in this room in that same month of January, 1924. "Anyone," said he, "who follows the decisions of the United States Supreme Court and of our own Court of Appeals cannot fail to observe that in these supposed shelters of reaction the law is being steadily rewritten to conform more nearly to the standards of the time and that an occasional display of atavism excites more wonder than the most advanced example of evolution and progress. I can readily point to recent liberalized decisions of courts of last resort which would have been deemed

[8] Lehman, *Judge Cardozo in the Court of Appeals.* Yale Law Journal, Vol. 48 (1939) pp. 386–7.

revolutionary even ten years ago, and might have been decided otherwise without affronting authority."[7]

Although as a junior judge in 1924 Irving Lehman appraised his associates as constituting a "great court,"[8] it is interesting to note that in June of that same year in an address given before this Association, Chief Judge Hiscock decried what he referred to as "a substantial volume of complaint of the courts as the institution through which our law is administered." Judge Hiscock—apparently a bit irked at the reproach then leveled at the courts—proceeded to devote the remainder of his address to what he termed "The Progressiveness of New York Law."[9]

We have thus seen from Judge Lehman's own appraisal of his new brethren of the Court of Appeals and from statements then made by two of his seniors on that bench, that when he joined the court the law was not static and the members of the Court were not illiberal. Entering what Judge Pound had caustically described as "the supposed shelters of reaction" the new junior Judge brought to the work of the Court a rare native endowment and an experience, to which reference has been made, reinforced by learning, technical skill and an aptitude for long-sustained, well directed effort which enabled him to serve on the Court of Appeals with distinction for nearly twenty-two years. His prodigious capacity for work is proven by the fact that during those twenty-two years he produced 734 opinions of which 513 were written during the sixteen years he was an Associate Judge and 221 were written during the period of almost six years while he was Chief Judge. Of those 734 opinions 609 expressed the view of a majority of the Court, 24 were concurring opinions and 101 were dissents.[10]

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[7] Judge Cuthbert W. Pound, *The Relation of the Practicing Lawyer to the Efficient Administration of Justice.* 9 Cornell Law Quarterly, p. 242.

[8] Op. cit. note 2, p. 27.

[9] Hiscock, *The Progressiveness of New York Law.* 9 Cornell Law Quarterly p. 371.

[10] Judge Lehman's opinions as an Associate Judge appear in the Court of Appeals Reports in Volumes 237–282; his opinions as Chief Judge appear in Volumes 282–294 inclusive.

The broad sweep of Judge Lehman's opinions covers practically the entire field of the law. It also convinces me that there is a modicum of truth in the words which Sir Walter Scott put into the mouth of the cynical Antiquary. "I tell you, Mrs. Hadoway, the clergy live by our sins, the medical faculty by our diseases, and the law gentry by our misfortunes."[11] And there are other conclusions to be drawn from the broad sweep of Judge Lehman's judicial writing. Although the twenty-two years within which his opinions were written is a brief period of time in the annals of our country and its law, they give evidence of the fact which we have come to realize, that history is not only influenced by dramatic incidents and striking personalities but also by the social and economic forces which—less obtrusively perhaps—mould and shape the destiny of a nation.[12]

The close association between the law of the land and the life of the people during the years which had immediately preceded Judge Lehman's coming to the Court of Appeals and a brief period thereafter, has been noted and deftly dealt with in an article written by Judge Leonard C. Crouch in 1927, soon after Chief Judge Hiscock retired from the Court by reason of the Constitutional age limit.[13] From that article we may safely assume that at the outset of Judge Lehman's career on the Court of Appeals he sensed the fact that at the time of his joining the Court there was prevalent an urge for change in certain fundamental legal principles and that the decisions then current placed an increased emphasis on those conditions of actual life to which the law must be applied and less emphasis upon the terms of the law itself. To quote Judge Crouch—"the change (then discernible) may be defined as a greater willingness to promote the general welfare at the price of infringing on individual rights."[14]

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[11] Sir Walter Scott, *The Antiquary*, Chapter XVI.

[12] Op. cit. note 1 "Law and History" (1934) p. 118.

[13] Crouch, *Judicial Tendencies of the Court of Appeals During the Encumbency of Judge Hiscock*, 12 Cornell Law Quarterly, p. 137.

[14] *Id.* p. 144.

Fifteen years previously the United States Supreme Court had said "The rule of *stare decisis* though one tending to consistency and uniformity of decision is not inflexible. Whether it shall be followed or departed from is a question entirely within the discretion of the court which is again called upon to consider a question once decided."[15] Indeed, only a brief time before Judge Lehman joined the Court of Appeals that Court had had occasion to say in its opinion in *Oppenheimer v. Kridel*[16] by Judge Crane, as he then was—"Courts exist for the purpose of ameliorating the harshness of ancient laws inconsistent with modern progress when it can be done without interfering with vested rights." As to Judge Lehman's reaction to that view I give you his own words: "I became a member of the Court a few months after that opinion was written. If I had come a little earlier perhaps I should have asked Judge Crane to add to that statement of the law a warning that though the power to disregard an outworn precedent should at times be exercised frankly, it should be exercised sparingly, for precedents create rules of law, and a judge should dare to set aside an ancient rule only where the relentless logic of time has demonstrated that the ancient rule is indeed unsuited to modern conditions. I have little doubt," continues Judge Lehman "that Judge Crane would willingly have agreed to add such a warning to his statement, and so would the other great judges who concurred in it."[17] The use in that statement of the phrase "it should be exercised sparingly," as limiting a court's power to disregard outworn precedents, is significant as indicating Judge Lehman's point of view on the controversial subject of *stare decisis*. Indeed Judge Cardozo, then a member of the Court of Appeals, had already said in his lectures on "The Nature of the Judicial Process," —"*Stare decisis* is at least the every day rule of our law" and

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[15] *Hertz v. Woodman*, 218 U.S. 205, 212 (1909).

[16] *Oppenheimer v. Kridel*, 256 N.Y. 156, 165.

[17] Lehman, *The Supremacy of the Law*. An address before the New York State Bar Association in 1941. (Report of New York State Bar Association, Vol. LXIV. p. 378 (1941).

"Adherence to precedent must then be the rule rather than the exception if litigants are to have faith in the even-handed administration of justice in the courts."[18] Although, as we have seen, Judge Lehman believed in 1924 that when a court exercises its power to disregard an outworn precedent such power should be exercised "frankly" but "sparingly," that belief, maintained by him through the years, was less rigid in 1939 when he said: "A court which clings to outworn precedents under changing conditions, which attempts to read permanently into the law any social philosophy, cannot be a great court even though composed of judges of learning, wisdom and public spirit."[19]

We have now given thought to the qualities which Irving Lehman brought to his work in the Court of Appeals in January, 1924. We have recalled the distinction which marked the personnel of that bench at that time including, as it did, five men who later occupied in succession the position of Chief Judge—one of whom became a Justice of the United States Supreme Court for a comparatively few years but long enough to impress his name indelibly upon the judicial history of this land.

We have seen too that at that particular time the law was not static, that the ten years immediately preceding Judge Lehman's coming to the Court had indicated an urge to change established legal principles. Accepting the statement by Judge Cardozo that "Learning is the springboard by which imagination leaps to truth,"[20] we are about to find, as a we examine a few of the opinions which Judge Lehman wrote, that as a member of the Court of Appeals his learning and his sense of justice were put to decisive use in the solution of a mass of novel economic, industrial and social problems for which there were no precedents.

Having in mind the cynical comment by no less an authority than Henry Adams, that philosophy consists chiefly in suggesting

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[18] Cardozo, *The Nature of the Judicial Process*, (1921) pp. 20, 34.

[19] Op. Cit. note 6, p. 385.

[20] Cardozo, "*The Paradoxes of Legal Science*" (1929), p. 60; cf. Lowell's Life of Keats, Vol. 1 p. 177.

unintelligible answers to insoluble problems,[21] I hesitate to call Irving Lehman a juristic philosopher. True it is that although many of the problems with which he was called upon to deal were well nigh "insoluble," we shall not find "unintelligible" the solutions he reached.

When years have passed over the head of an appellate judge and his eye happens to fall upon the first prevailing opinion he wrote for his court, he is more likely than not to regard that opinion with misgivings. No such concern should have troubled Irving Lehman. The first case in which he wrote a prevailing opinion in the Court of Appeals was in *People v. Weller*,[22] involving a constitutional question that set off repercussions which, although delayed, were ultimately favorable. Although the decision was affirmed by the United States Supreme Court on the single point argued there, a decisive principle upon which the Court of Appeals had based its decision was not approved by the Supreme Court until ten years later and then in a wholly unrelated case. As that belated approval redounds to the credit of Judge Lehman I trace here the meandering course through the courts by which that decisive principle made its way before it was finally ruled and came to rest.

By the Laws of 1922, Chapter 590, the Legislature made its first attempt to regulate the business activity of ticket brokers.[23] When doing so it had declared as a matter of legislative policy that the charge for admission to theaters and other places of amusement "... is a matter affected with a public interest and subject to supervision of the state for the purpose of safeguarding the public against fraud, extortion, exorbitant rates and similar abuses."[24] The means chosen by the Legislature to accomplish that end were two in number. First, to require a person or corporation engaged in the resale of tickets of admission to theaters or places of amuse-

[21] Op. cit. note 13, p. 144.

[22] 237 N.Y. 319.

[23] General Business Law, Art. X-B as added by Chapter 590 of the Laws of 1922 (subsequently amended by L. 1928, ch. 600; L. 1937 ch. 699; L. 1940 ch. 614).

[24] *Id.* §167.

ment to procure from the comptroller annually a license to be granted under stated conditions upon payment of a prescribed fee[25] and to furnish a bond to secure the non-violation of the act.[26] Secondly, the act forbad the resale of such tickets at a price exceeding fifty cents in excess of the price printed on the face of the ticket.[27] A violation of those statutory requirements was made a misdemeanor.[28] In *People v. Weller* the defendant, a ticket broker, was convicted in the Court of Special Sessions of a violation of that statute, following a concession by his counsel, Mr. Louis Marshall, that the defendant had sold theater tickets without procuring either the statutory license, or furnishing the statutory bond. Affirmance of that conviction at the Appellate Division was followed by the defendant's appeal to the Court of Appeals. There Mr. Marshall argued in support of his client's position that the due process clause of the Constitution was violated when (1) brokers were restricted by the statute in the price they could charge for theater tickets—a marketable commodity; or (2) for their services in furnishing tickets—a property right; and (3) by depriving them of their liberty of entering into contracts for the sale of such property or the rendition of services which they were requested to render and able to do. It was also argued that the business of conducting a theater and consequently of selling and procuring tickets of admission is not affected with a public interest.

In affirming the *Weller case* the Court of Appeals reached the conclusion that the Legislature had the right, under the police power and in the circumstances disclosed by that record, to attempt to remedy an abuse which the statute was designed to correct. To that end the Court ruled that the remedy afforded by the challenged statute encroached upon the liberty of the individual only to the extent that the Legislature might properly regard as reasonably calculated to remedy the abuse and that the Legis-

[25] *Id.* §168.
[26] *Id.* §169.
[27] *Id.* §172.
[28] *Id.* §173.

lature had the responsibility of determining whether the remedy was wise and would promote the public welfare. In support of that conclusion and in line with the principle that courts are called upon to determine only whether the Legislature had acted within its powers in enacting such legislation, the opinion by Judge Lehman contains the following statement which I think is noteworthy: "The same respect for individual liberty which should ordinarily deter the legislature from an attempt to restrict freedom, might under special circumstances impel the legislature to seek a remedy for conditions which, unless controlled, will leave the patrons of the theatre 'to the mercy of speculators.' The liberty of the individual citizen to contract freely should be jealously guarded even from encroachments by the state, and where barter is free and demand creates supply perhaps economic laws and not the fiat of the state is the proper corrective of exorbitant prices; but where the liberty of the individual citizen to contract freely has been restricted by the circumstance that a man or group of men has obtained control of the supply of a commodity which the public desires or commonly uses, and this control is used to compel the individual to pay any price which may be demanded though that price be far beyond the price which would be fixed by free contract between consumer and producer, a legislative mandate which regulates the exercise of the compulsive force may in effect restore and not diminish the liberty of the individual."

I cite this first opinion written for the Court of Appeals by Judge Lehman because it affords for us an early demonstration of his clear thinking which went directly to points that were decisive of a problem which, in this instance, was then new. Indeed it demonstrates those qualities of mind to which Chief Judge Pound referred when, in his homely way of stating facts, he is reported to have said—"Lehman can take the hide off a case faster than any man I have ever known."[29]

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[29] See 294 N.Y. at p. XIV.

When the *Weller case* was reviewed and affirmed by the United States Supreme Court,[20] the statement of law by Judge Lehman which I have quoted was not given approval. The reason was that at that time the higher court limited its decision to a consideration of the constitutionality of the licensing requirement. Viewing that requirement of the statute as severable from the price restricting provisions thereof—the validity of the price restriction was not made the subject of a ruling. However, two years later in 1926, the constitutionality of the price restriction provision of the New York statute was again challenged in *Tyson & Brother v. Banton*[21] and was there held by the Supreme Court to violate the due process clause upon the ground that places of amusement to which tickets are sold are not so devoted to public use and so affected with a public interest as to authorize the Legislature to fix the maximum amount which patrons are required to pay. To that ruling there were dissents by Justices Holmes, Brandeis, Stone, and Sanford. Eight years later, however, there came to the Supreme Court the case of *Nebbia v. New York*[22] where—to remedy certain evils in the milk industry which reduced the income of producers below the cost of production and thereby threatened to deprive a community of an assured supply of milk—a New York statute had been enacted to prevent destructive price-cutting by fixing, in certain circumstances, a minimum price for milk. The opinion written in that case upholding the challenged statute declared—as Judge Lehman had done ten years before in the *Weller case*—that the power of a state to regulate business in the public interest extends to the control and regulation of prices for which commodities may be sold in those circumstances where price regulation is a reasonable and appropriate means of rectifying the evil which prompted the remedy. In that connection the ruling of the Supreme Court was that the phrase "affected with a public interest" can mean no more than

[20] 268 U.S. 319.
[21] 273 U.S. 314.
[22] 291 U.S. 502.

that an industry, for adequate reason, is subject to control for the public good and that upon proper occasion and by appropriate measures, a state may regulate a business in any of its aspects, including the prices to be charged for the product or commodity it sells. In the opinion for the Supreme Court, written by Mr. Justice Roberts, these words are to be found "The statement that one has dedicated his property to a public use is, therefore, merely another way of saying that if one embarks in a business which public interest demands shall be regulated, he must know regulation will ensue. . . . The private character of a business does not necessarily remove it from the realm of regulation of charges or prices."[28] Thus in the field of public law the United States Supreme Court in 1934 ultimately approved in principle the pronouncement made for the Court of Appeals ten years earlier by the first opinion written for that court by Judge Lehman at a time when the problem then posed by *People v. Weller* was new.

Whenever the Court of Appeals was urged to nullify a statute Judge Lehman recognized that the responsibility for statutory enactments lies with the Legislature—answerable, as its members are, directly to the People—and that, in such cases, the judicial function is narrowly limited to a determination whether within the broad grant of authority vested in the Legislature, it has exercised a judgment for which there is reasonable justification. Sensing, as he did, that during the years of his service as a judicial officer there had developed an increase of judicial interference with both federal and state legislation, Judge Lehman also recognized that the restricted area for the exercise of the judicial function, where constitutional issues are involved, is a sound reason for great caution in its use. Although he participated in the decision of many constitutional issues growing out of social, economic and industrial maladjustments caused by World Wars I and II, I am told by those who then shared his day's work that the contribution of which he was most proud was his concurring opin-

[28] Op. cit. note 32, pp. 534, 535.

ion in *People v. Sandstrom*.[84] That case involved the prosecution, under provisions of the Education Law,[85] of the parents of a child who, while in attendance at a public school and with her parents' knowledge, persisted in her refusal to join in the prescribed school ceremony of saluting the flag. The parents of the child—as members of the religious order known as Jehovah's Witnesses—contended that to compel their daughter to salute the flag, contrary to her religious conviction, violated provisions of the State constitution which guarantees the free exercise and enjoyment of religious profession and worship.[86] Although Judge Lehman joined with his associates in voting to reverse the conviction and to dismiss the information upon which the defendants had been tried, he filed a concurring opinion which reached that result by different reasoning. In that opinion he said in part: ". . . I can find in the statute no fair implication that every child *must* take part in such exercises, even though some children might be taught by their parents or religious instructors that a salute to the flag would be disobedience to the command of God. A command of the State to such a child, whether given by the Legislature or by a school principal deriving authority from the statute would, I think, transcend the limitations imposed by the Constitution upon the powers of government.

"Episcopalians and Methodists and Presbyterians and Baptists, Catholics and Jews, may all agree that a salute to the flag cannot be disobedience to the will of the Creator; all the judges of the state may agree that no well-intentioned person could reasonably object to such a salute; but this little child has been taught to believe otherwise. She must choose between obedience to the command of the principal of the school, and obedience to what she has been taught and believes is the command of God. She has chosen to obey what she believes to be the command of God. I cannot assent to the dictum of the prevailing opinion that she

[84] 279 N.Y. 523.
[85] Education Law, §627 subd. b(2) and §712.
[86] Constitution of the State of New York, Art. 1, §3.

must obey the command of the principal, though trembling lest she incur the righteous wrath of her Maker and be slain 'when the battle of Armageddon comes.' . . .

"There is no need here to attempt to mark the exact limits of governmental powers in constraint of conscience. Certainly such governmental powers may not at their widest be asserted to prohibit beliefs and practices which are not in conflict with good order or to compel acts which have no reasonable relation to the peace or safety or even the general welfare of the State or Nation. . . .

"The Legislature cannot authorize the school authorities to give an order which outrages the religious conscience of a child at least unless such order does in reasonable degree tend to promote the general health or welfare or is required for the orderly conduct of the school. . . .

"The salute of the flag is a gesture of love and respect—fine when there is real love and respect back of the gesture. The flag is dishonored by a salute by a child in reluctant and terrified obedience to a command of secular authority which clashes with the dictates of conscience. . . ."

From these excerpts from Judge Lehman's opinion the fact is to be noted, which I regard as significant, that the reasoning by which he reached his conclusion was closely parallel to that by which the Supreme Court of the United States later decided the same issue and thereby overruled its own prior decision rendered when it considered a like problem.[27]

Some of us have heard Judge Lehman remark facetiously that in the field of tort law he was less infallible than on those higher levels of legal controversy where constitutional and social problems germinate. However, in *Tedla v. Ellman*[28] his opinion gave evidence of a lively sense of how the other half lives, with special reference to the legal rights asserted by the parties to that action.

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[27] *Board of Education v. Barnett*, 319 U.S. 624, overruling *Minersville School District v. Gobitis*, 310 U.S. 586.

[28] 280 N.Y. 124.

In that case the two plaintiffs Mrs. Tedla and her brother John Bachek, while walking eastwardly along the eastbound or right-hand traffic lane of a public highway in Suffolk County, were struck by the defendant's eastbound automobile which injured Mrs. Tedla and killed her brother. There was evidence—having an important bearing upon the legal problem which eventuated—that at that evening hour the traffic in the westbound lane was very heavy while in the eastbound lane, where Mrs. Tedla and her brother were walking, there were only a few cars passing. At the time of the accident Mrs. Tedla and her brother—a deaf mute—were engaged in their occupation of collecting and selling junk. Each was pushing a baby carriage loaded with trash and wood which they had collected at an incinerator maintained by the Village of Islip. As it was then becoming dark the brother was carrying a lighted lantern to fend off any passing traffic. At Trial Term the jury awarded verdicts to the plaintiffs in which was implicit a finding that the accident was due solely to the negligence of the operator of the automobile. When the case reached the Court of Appeals the defendants did not challenge the finding of negligence on the part of the operator but maintained that Mrs. Tedla and her brother were guilty of contributory negligence as a matter of law. In support of that defense it was pointed out that the plaintiffs were struck while walking easterly along the lane for eastbound traffic; that while in that position, and at the time of the accident, they failed to comply with the statute which required them, as pedestrians, to "keep to the left instead of the right side thereof, so as to permit all vehicles passing them in either direction to pass on their right."[39] The defendants as appellants also leaned heavily upon the rule of *Martin v. Herzog*,[40] where a plaintiff had failed to place lights upon a vehicle as required by statute and as a result was charged with contributory negligence as a matter of law. In those circumstances the opinion

[39] Vehicle and Traffic Law (Cons. Laws Ch. 71) §85 subd. 6 (Laws 1933, ch. 114).
[40] 228 N.Y. 164, 168.

by Judge Cardozo stated ". . . We think the unexcused omission of the statutory signals is more than some evidence of negligence. It is negligence in itself. . . . By the very terms of the hypothesis, to omit, wilfully or heedlessly the safeguards prescribed by law for the benefit of another that he may be preserved in life and limb, is to fall short of the standard of diligence to which those who live in organized society are under a duty to conform. That, we think, is now the established rule in this State."

Without indicating an intention by the Court to recede from the rule of *Martin v. Herzog*, Judge Lehman took the position that the analogy between that case and *Tedla v. Ellman* was "incomplete." In support of that position he noted that the type of statute involved in *Martin v. Herzog* was one in which the Legislature had provided a safeguard in addition to those already established, and had defined in rigid terms both a duty and a standard of care. In a case involving that type of statute, failure to observe the standard imposed, is negligence as a matter of law. Such a statute, asserted Judge Lehman differs from the one invoked in *Tedla v. Ellman* where the Legislature fixed no standard of care which, under all circumstances, would tend to protect life, limb or property, but has codified or supplemented a common law rule which had always been subject to limitations or exceptions or has laid down a statutory rule of conduct regulating rights and obligations in a manner calculated to promote public convenience and safety. Accordingly, the violation of a statute of the latter type may be justifiable, and does not constitute negligence as a matter of law, when—as in the *Tedla case*—observance of the statutory requirement, in all the circumstances, would have placed the violator in more imminent danger of accident and harm.

After noting that Mrs. Tedla and her brother had for their own safety chosen the eastbound lane, where only a few vehicles were passing, in preference to the westbound lane where traffic at that evening hour was "very heavy" Judge Lehman wrote: "Until the

recent adoption of the new statutory rule for pedestrians,[a] ordinary prudence would have dictated that pedestrians should not expose themselves to the danger of walking along the roadway upon which the 'very heavy Sunday night traffic' was proceeding when they could walk in comparative safety along a roadway used by very few cars. It is said that now, by force of the statutory rule, pedestrians are guilty of contributory negligence as matter of law when they use the safer roadway, unless that roadway is left of the center of the road. Disregard of the statutory rule of the road and observance of a rule based on immemorial custom, it is said, is negligence which as matter of law is a proximate cause of the accident, though observance of the statutory rule might, under the circumstances of the particular case, expose a pedestrian to serious danger from which he would be free if he followed the rule that had been established by custom. If that be true, then the Legislature has decreed that pedestrians must observe the general rule of conduct which it has prescribed for their safety even under circumstances where observance would subject them to unusual risk; that pedestrians are to be charged with negligence as matter of law for acting as prudence dictates. It is unreasonable to ascribe to the Legislature an intention that the statute should have so extraordinary a result, and the courts may not give to a statute an effect not intended by the Legislature. . . . We may assume reasonably that the Legislature directed pedestrians to keep to the left of the center of the road because that would cause them to face traffic approaching in that lane and would enable them to care for their own safety better than if the traffic approached them from the rear. We cannot assume reasonably that the Legislature intended that a statute enacted for the preservation of the life and limb of pedestrians must be observed when observance would subject them to more imminent danger."

Thus—by his opinion in *Tedla v. Ellman*—did a legal scholar

[a] See infra note 39.

contribute to the solution of what has been said to be "One of the most disputed questions in the whole law of torts."[43]

Although Judge Lehman wrote for the court its views in many cases involving problems arising in the administration of estates and trusts, none of those opinions has been more frequently cited than *Newman v. Dore*.[44] The Legislature of 1929 had made fundamental changes in the Decedent Estate Law[45] with respect to the personal right of election by a surviving spouse to take his or her share of a decedent's estate, either in the absence of or against a testamentary provision, and subject to certain conditions and limitations set forth in the statute. Although those statutory changes prevented disinheritance by testamentary disposition, the statutes which brought about those changes were silent as to the effect of an *inter vivos* conveyance for that purpose. In that state of the law Ferdinand Straus died leaving a will dated May 5, 1934 which contained a trust provision for his wife for her life of one-third of his property both real and personal. As the statute, in those circumstances, did not give the wife a right of election to take her share—viz. one-third of the estate—as in intestacy, she would receive the income for life from a trust fund of the intestate share but she would not take that share. The legal problem in *Newman v. Dore* arose from the further fact that three days before his death the testator executed an *inter vivos* trust agreement by which in form at least, he transferred to trustees all his real and personal property. If that trust instrument served to divest the settlor of his property, then he would leave no estate and his widow would take nothing. In those circumstances, the action of *Newman v. Dore* was instituted in which the beneficiary named in the trust agreement—a niece of the decedent—sought to compel the trustees to carry out its terms. Issue was joined upon the decisive point in the case when the decedent's widow, by her answer,

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[43] Davis, *The Plaintiff's Illegal Act as a Defense in Actions of Tort*. Selected Essays on the Law of Torts, p. 558.

[44] 275 N.Y. 371.

[45] Decedent Estate Law, §§18, 83 (L. 1929, ch. 229).

challenged the validity of the transfer of the decedent's property to the trustees named in the trust instrument. The ruling by the Trial Justice, later affirmed by the Appellate Division, was that the trust agreement was executed by the decedent for the purpose of circumventing the laws of the State of New York and particularly sections 18 and 83 of the Decedent Estate Law. When the case was ruled by the Court of Appeals the opinion by Judge Lehman appraised the record and the problem it presented in these words: "Undoubtedly the settlor's purpose was to provide that at his death his property should pass to beneficiaries named in the trust agreement to the exclusion of his wife. Under the provisions of the Decedent Estate Law, the decedent could not effect the desired purpose by testamentary disposition of his property. The problem in this case is whether he has accomplished that result by creating a trust during his lifetime."

The solution arrived at by the Court of the novel problem thus presented was stated by Judge Lehman as follows: "Under the laws of the State of New York, and particularly sections 18 and 83 of the Decedent Estate Law, neither spouse has any immediate interest in the property of the other. The 'enlarged property right' which the Legislature intended to confer is only an expectant interest dependent upon the contingency that the property to which the interest attaches becomes part of a decedent's estate. The contingency does not occur, and the expectant property right does not ripen into a property right in possession if the owner sells or gives away the property. . . . The question is, how far the statute protects that right even while it remains only expectant and contingent. . . . Under the trust agreements executed a few days before the death of the settlor, he reserved the enjoyment of the entire income as long as he should live, and a right to revoke the trust at will, and in general the powers granted to the trustees were in terms made 'subject to the settlor's control during his life,' and could be exercised 'in such manner only as the settlor shall from time to time direct in writing.' Thus by the trust agreement which transferred to the trustees the settlor's

entire property, the settlor reserved substantially the same rights to enjoy and control the disposition of the property as he previously had possessed, and the inference is inescapable that the trust agreements were executed by the settlor, as the court has found, 'with the intention and for the purpose of diminishing his estate and thereby to reduce in amount the share' of his wife in his estate upon his death and as a 'contrivance to deprive . . . his widow of any rights in and to his property upon his death.' They had no other purpose and substantially they had no other effect. Does the statute intend that such a transfer shall be available as a means of defeating the contingent expectant estate of a spouse? . . . Since the law gives the wife only an expectant interest in the property of her husband which becomes part of his estate, and since the law does not restrict transfers of property by the husband during his life, it would seem that the only sound test of the validity of a challenged transfer is whether it is real or illusory. . . . The test has been formulated in different ways, but in most jurisdictions the test applied is essentially the test of whether the husband has in good faith divested himself of ownership of his property or has made an illusory transfer. . . . Judged by the substance, not by the form, the testator's conveyance is illusory, intended only as a mask for the effective retention by the settlor of the property which in form he had conveyed. . . . In this case it is clear that the settlor never intended to divest himself of his property. He was unwilling to do so even when death was near."

That opinion in *Newman v. Dore,* as I view it, is a demonstration of the resourcefulness of legal scholarship and of judicial writing at its best as applied to a record which called for the application of new law to an entanglement of facts.

The opinions I have mentioned were prevailing or concurring opinions. I cannot completely ignore Irving Lehman in the role of a dissenting judge, where some may think he was at his best. We have seen that during his twenty-two years on the Court of Appeals Judge Lehman assumed that role one hundred and one times and I can assure you that in each of those instances he made

crystal clear the point upon which rested his dissent from the majority view of his court. I have also quoted his description of a conference of the Court including his comment that: "The discussion at times became warm." To that comment I may add that when Irving Lehman was presenting the view of a dissenter his contribution to the debate, while always fairly and powerfully presented, was rarely a cooling draft.

Of all the dissents into which Irving Lehman put not only his great mind but his great heart, I think the argument he made at conference and the dissenting opinion he wrote in *Opera-On-Tour Inc. v. Weber,*[45] were among his supreme efforts—an effort his associates of that time will never forget. The facts in that case had excited much interest in the fields of labor relations and industrial economy. For many years when opera companies were on tour outside the metropolitan areas they were unable to book performances of grand opera in the nation's smaller cities. The reason was that patronage in those communities was inadequate to meet the cost of the full compliment of singers, dancers and orchestral musicians essential to a first class production. It was in those circumstances that the plaintiff company, in furtherance of its effort to take grand opera to smaller cities and to effect the economy which such a project required, conceived the idea of substituting for the traditional orchestra of live musicians a specially built phonographic machine which dispensed recorded music covering the complete scores of grand operas accurately synchronized with the voices of the vocalists. This scheme was put into operation by the plaintiff in 1938 and led to a tour through the southern states which was successful until the company reached Birmingham, Alabama. There, with an audience of four thousand seated and awaiting the performance of "Faust," the defendant American Federation of Musicians caused the defendant International Alliance of Theatrical Stage Employees to order its members, then employed by plaintiff as stage hands, to terminate

[45] 285 N.Y. 248, see dissenting opinion at pp. 360–375.

at once their services for the plaintiff. At that time—which, to say the least, was inopportune—the employees had expressed no grievance as to the terms or conditions of their employment; no controversy existed between the plaintiff and the defendant unions except the latter's demand that the machine which furnished recorded music be discarded to make way for the employment of musicians comprising an orchestra. Responsive to the demands made by the defendant unions, the plaintiff's stage hands "walked out," thus making impossible the plaintiff's scheduled performance of grand opera in Birmingham or elsewhere. At Special Term injunctive relief sought by the plaintiff against the defendant unions was granted;[46] at the Appellate Division a divided court reversed the judgment entered upon the order of Special Term.[47] When the case reached the Court of Appeals, on appeal by the plaintiff, the question for our review was narrowed to the inquiry whether the action of the defendant unions was immune from judicial restraint, which action had as its sole design to displace a mechanical device that had successfully reproduced orchestral music, in favor of the employment of live musicians and which displacement had brought about a "walk-out" by plaintiff's stage hands and a complete disruption of the plaintiff's business. Upon the conclusion of the argument of that appeal every member of our bench knew that the barometer in our conference room had already registered a quick descent and was set for a storm. A few days later in the consideration of the case at conference and in the Court's opinion written by Judge Finch the view expressed by the majority was that the action taken by the defendant unions—which in effect would compel the plaintiff to abandon its cost-saving plan of producing orchestral music by a mechanical device as a substitute for human labor—did not constitute a lawful labor objective.[48] Resting its decision on that view of the problem the Court reversed the judgment entered upon

[46] Id. 170 Misc. 272.
[47] Id. 258 App. Div. 516.
[48] Id. 285 N. Y. 348, 356, 357 and see Civil Practice Act §876-a, subd. 10(c).

the order of the Appellate Division and affirmed the judgment entered at Special Term. In the conference discussions which led to that decision, and in his dissenting opinion, Judge Lehman treated the injunction issued at Special Term as one "against a strike and nothing else."[40] With that concept as a basis he posed the rhetorical question: "Is it unlawful now for musicians and members of affiliated unions, likewise employed in stage productions, to combine to organize strikes with the objective of compelling employers to abandon the use of such devices, and thus stop further inroads and to regain the loss of employment already suffered?" His answer to his own quaere was as follows: "Here is an economic conflict between workers and producers. The workers seek to compel the producers to employ more men than the producers desire to employ, or than are required for the conduct of their business in manner which is acceptable to the public and which will produce greatest profit to the producers. The labor-saving machine displaces labor and reduces costs. That is its purpose. By displacing labor it causes unemployment in some places; by reducing costs it may make it possible to conduct at a profit a business which would otherwise be doomed to failure. A combination to compel the abandonment of cost-reducing devices may thus be a threat of ruin to a business already upon a precarious economic footing. Here it is such a threat to the plaintiff. Almost every strike, indeed, involves threat of ruin to the employer unless the employer accepts the demands of the strikers, for ordinarily strikes are successful only where the employer concludes that to run his business he must make terms with the strikers. None the less a strike to achieve a legitimate economic purpose cannot be outlawed because, if successful, some employers will no longer be able to conduct business at a profit; nor is a combination unlawful because it includes all the workers within a trade and thus no employer can find workers who know that trade and are willing to accept employment unless the employer

[40] Id. p. 364.

reached an agreement with the members of the combination."[50] Asserting that the case involved nothing more than an economic conflict between an employer and its employees who sought to compel the employment of more workers, Judge Lehman concluded that a court was without power to restrain the action by the defendant unions which he regarded as within the allowable area of economic conflict.[51] That he felt deeply the fact that the Court's ruling was opposed to his view of the problem is proven by the statement made in his dissent in a later case, viz., that he could not accept the decision in *Opera-on-Tour, Inc. v. Weber*, as a precedent for subsequent decisions.[52]

I hasten to add, however, that after our final conference on the *Opera-on-Tour case*—one of the "warm" sessions, as he called them—his delightful sense of humor came to the surface as it always did to assuage any pique which the decision may have engendered. We knew that it was so when, as he left the conference room, we heard him toss off for the amusement and relief of us all, those familiar verses by Lewis Carroll of which he was fond—

" 'You are old, Father William' the young man said,
'And your hair has become very white;
And yet you incessantly stand on your head—
Do you think at your age it is right?'
" 'In my youth,' Father William replied to his son,
'I feared it might injure the brain;
But now that I'm perfectly sure I have none,
Why, I do it again and again' . . . "

We have been thinking of a man who achieved life-long happiness in his work—a man who holds an assured place of honor and distinction in the judicial history of this state. We know, however, that "officialdom, however it displays itself, is the husk and that

[50] Id. p. 371.
[51] Id. p. 372.
[52] *American Guild of Musical Artists v. Petrillo*, 286 N. Y. 226, 232.

what is precious is the man within."[53] And so, although you may accuse me of going off the reservation which I fixed for myself when I chose our subject, I would like to end on a note sounded by Irving Lehman on the night of June 19, 1945, in the address by which he introduced General Eisenhower at the Waldorf Astoria dinner tendered by this City to that world hero. Although you have had in this community many great days—fête days of many kinds—you never, except perhaps on the occasion of five days ago, gave to any man a greater welcome than was given that day to the leader of the Allied Forces in World War II upon his victorious home-coming. And certain it is that no man has ever been more deserving of your welcome. Because the heart of New York was in that welcome and because Irving Lehman sensed so deeply, and with such accurate knowledge of the facts, what an Allied victory had meant to all peoples of the earth, he felt himself greatly honored when he was chosen to introduce the City's guest. I quote at length from that introduction because in it there flares the vivid, flaming spirit of Irving Lehman the man, the great humanitarian. In that address he gave voice to qualities he possessed in abundance which I shall let his own words of that night express:[54]

"General Eisenhower:

Today from the sidewalks of New York, from its roofs and windows, from its ball grounds and parks, millions roared their warm welcome home to you. They brought you a wordless message more eloquent than the most carefully chosen words could achieve; a message of affection for you as a man and gratitude to you as the Supreme Commander who led the armies of the Allied Nations to triumphant victory in Europe.

That message, that message I know, went straight to your great heart from the great hearts of millions of New Yorkers. And believe me, sir, that the people of New York have great hearts. Since that night in November, 1942, when our armies

[53] Cardozo, "Law and Literature and Other Essays. *The Comradeship of the Bar.*" (1930) pp. 189–90.

[54] From the New York Times—Issue of June 20, 1945 at page 6.

attacked in North Africa, we have shared your anxieties as we have shared your confidence in ultimate victory, and even when we grieved for the loved ones we have lost we bore our losses with all the fortitude that we could summon.

It has been said that there are more Italians in New York than in Rome, more Irish than in Dublin, more Jews than in Jerusalem or Tel Aviv. Doubtless you, sir, have heard some say that the cause of this diversity of racial and national origin, the great principles of freedom and democracy on which American institutions are soundly based, are not perhaps as deeply cherished or as well understood here as let us say in Kansas; that our citizens will not make the same willing sacrifices to maintain what we call the American heritage. The names, General Eisenhower, on the daily casualty lists which we anxiously scan with heavy hearts, the names on the lists of men cited for heroism and selfless devotion which we read with glowing pride, attest beyond doubt the worth of New York's immigrant sons. Those who say otherwise ignore the real spirit of America and the real spirit of New York.

I once heard that spirit dramatically expressed by Al Smith, the Happy Warrior born in New York of immigrant parents, and John W. Davis, the accomplished diplomat, statesman and acknowledged leader of the bar. It was at a small private dinner in 1933, soon after Hitler became Chancellor. A member of the German Debt Commission then in this country tried to persuade us that night that the roots of nazism lay in Germany's economic misery and that the way to destroy nazism was to assist Germany to become a prosperous and satisfied nation.

Al Smith then spoke up in his inimitable way. He said, 'Sir, America can't understand that talk or accept that kind of excuse or explanation. Five years ago I ran for President, and I won't say that racial and religious prejudice was without influence in that campaign, but I got over fifteen million votes, and if the winners had attempted to put me in a prison or concentration camp more than fifteen million Americans would have marched on Washington and would have freed me. That,' he said, 'is America.' And Davis then broke in and said: 'And the Davises would have marched side by side with the Smiths.' "

That is the spirit of America and you, General Eisenhower, know perhaps better than any other, for you have seen Americans of British stock and of Irish stock—of Italian stock, of Ger-

man stock and even Japanese stock—Catholics and Protestants and Jews but Americans all—gallantly march shoulder to shoulder, through hell itself, that 'government of the people, by the people, for the people, should not perish from the earth.'. . .

I think the people of this city would wish me to bring you tonight a more solemn message than you heard (today). Last month when our victory in Europe was announced there was some unrestrained rejoicing just as there was unrestrained rejoicing today, but almost immediately the people of the City of New York in sober mood flocked to churches and synagogues there to give thanks to the Lord whose prophet had said that 'Out of Zion shall go forth the law and the word of the Lord from Jerusalem. . . . And men shall beat their swords into ploughshares and their spears into pruning hooks. And nations shall no longer lift up arms against nation. Neither shall there be war any more.'

On that day of victory the same millions who today greeted you so joyously, Catholic, Protestant and Jews—yes, and even men who reject all creeds—worshiped the Prince of Peace who taught all the world the way to peace when in Jerusalem He proclaimed for all the world to hear that the two great commandments of the law which God had proclaimed long before on the slopes of Mount Sinai were: 'Thou shalt love Thy God with all thy heart and with all thy soul' and 'thou shalt love thy neighbor as thyself.'

That was the law which went forth from Zion. That was the word of the Lord which went forth from Jerusalem and when all the world listens to the Prince of Peace and obeys the commandments of the Lord, then will the kingdom of God be established on earth and the words of its prophet will be fulfilled, for nation will no longer lift up arms against nation. Neither shall there be war any more. . . ."

Thus, on a great occasion, spoke Irving Lehman—a great humanitarian.

In Maxwell Anderson's "Valley Forge" he tells us by one of his characters—

> "There are some men who lift the age they inhabit till all men walk on higher ground in that lifetime."

Like all whose lives touched Irving Lehman's we of the

Court of Appeals who had the rare privilege of working with him there will ever walk on higher ground because he labored with us and because he walked with us a little way along the road of life. For us his life is an inspiration; and for our work as a court his memory is a benediction.

Address

By João Neves da Fontoura

Minister of Foreign Affairs of Brazil

Fellow Members of the Bar Association:

My present visit to the United States has meant a great deal to me, both as a source of civic pride and personal satisfaction. I arrived here in my capacity of Foreign Minister of my country to take part in the Meeting of Consultation of the Ministers of Foreign Affairs of the American Republics, and I had the honor to contribute to the work done toward the objectives of defense of our Continent and the establishment of clear and stable regulations for economic cooperation between our 21 republics.

Everywhere, I met with an atmosphere of sympathy for Brazil, of faith in our friendship, of affection for Brazilians and all this led me to believe that the friendship between Brazil and the United States has never been stronger.

Now that I am about to return to my own country, I find myself overwhelmed with new marks of appreciation. Yesterday it was the Pan American Society and the American-Brazilian Association; this morning, His Eminence Cardinal Spellman, Archbishop of New York, kindled anew the sense of spiritual guidance which was the great gift of my Jesuit mentors.

Now it is you, fellow members of the legal profession, who honor me with a dinner as imposing as it is significant. Your generous tribute makes me realize that in my present position in public life, I owe a great deal to the lessons learned during 25 years of law practice. Because, in reality, all my career in political campaigns, in Parliament, in the Administration, has been in-

Editor's Note: This address by the Minister of Foreign Affairs of Brazil was delivered at a dinner in his honor held at the House of the Association on April 25, 1951.

fluenced by my juridical formation which is reflected in a love for the rule of the law (which I have never deserted) and in that disposition to stand and fight that is part and parcel of the profession. No other activity opens such wide horizons. Nor is there any other which is a better training ground for the embroilments of politics.

Before so many distinguished members of the legal profession I dare not place myself in the patronizing position of praising the career which we chose in the balmy days of our youth. I confine myself merely to pointing out that in these uncertain days, there is a significant difference between being a lawyer practising law in a democracy, and trying to do the same thing under a totalitarian regime. Without democracy there is no liberty, and without liberty there is no room for the exercise of the defence of rights. In a general way, all professions can, to a certain extent, be carried on under an arbitrary government, except ours. Ours does not admit of restrictions which are not provided for and expressed by the law; of its very essence, the legal profession cannot be asked to submit to personal or factional limitations. Even judges can resist oppression with silence, but the lawyer can never remain silent. His weapon is his voice or his pen, neither the one nor the other can be restrained; speaking or writing, the lawyer must be free to say what he wants to or what in his judgment has to be said. Certainly, the evolution of juridical norms is a constant process; it reflects changes in the economic environment and in social conditions, but civilizations stand or fall along with the victories or defeats of law.

My dear friends, you are a link in a long chain of juridical tradition. You live in a country where public opinion means a great deal, and, in the ultima ratio, the judicial body, which decides on the constitutionality of laws has the balance of power in its hands.

May God protect lawyers, not for the sake of the profession itself, but in order to safeguard the very principle of liberty. As long as we exist, liberty will survive the assaults which from time

to time are launched by tyrants with the rancorous tenacity characteristic of the forces of evil.

But in spite of everything, in spite of the shadows which are gathering on the horizon, I feel within myself a great hope for peace. My visit to this hectic city of grandeur and progress has increased my confidence in the future of mankind. We are witnessing today, in a different form, the renaissance of the free cities of the Middle Ages. Their cities were great commercial emporiums; ours are great lanterns for public opinion, free and untamed. Look at London, intrepid and daring in 1940, unflinching under criminal bombardment; look at Paris, five years after, organizing resistance during the blackouts; and now think of New York, from which the light of democratic hope is spreading out in every direction, with a guarantee of liberty for man, independence for nations, and survival for law and justice. You lawyers are the front line soldiers of this new crusade. The knights of law have always been the brave vanguard of liberty.

Review of Recent Decisions of the United States Supreme Court

By Howard C. Buschman and Fred N. Fishman

In two of the cases selected for review in this issue, there was no majority opinion. When this occurs the disposition represents only the judgment of the Court, and the reasoning expressed by the groups of Justices comprising the majority has no standing as precedent.

JOINT ANTI-FASCIST REFUGEE COMMITTEE V. McGRATH

The preoccupation with the loyalty of government employees engendered by the critical international situation has been intensified by recent criminal trials involving breaches of trust by former public servants. On the other hand, many patriotic citizens have been alarmed at the contribution which a sweeping loyalty program embracing all echelons makes to the creation of an atmosphere of fear which may deter free expression and inquiry.

Against this background the Supreme Court, in a group of opinions delivered on April 30, considered a major aspect of the President's Employees Loyalty Program in the Executive Branch of the Government, promulgated in 1947 by Executive Order No. 9835. The Loyalty Order established as a standard for refusal of, or removal from, employment that "on all the evidence, reasonable grounds exist for belief that the person involved is disloyal to the Government of the United States." In connection with the determination of disloyalty, there may be considered "[m]embership in, affiliation with or sympathetic association with" any organization designated by the Attorney General "after appropriate investigation and determination . . . as totalitarian, fascist, communist or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means." When the loyalty of an employee is suspect he receives a written statement of the charges against him and may submit a written answer. Upon request he may have an administrative hearing before the loyalty board in the agency employing him and may appear personally with counsel and present evidence. However, the Government does not disclose confidential information upon which the loyalty charge may be based, and the employee is not confronted with the Government's confidential informants or apprised of their identity. After the agency's loyalty review procedure is exhausted, the employee may obtain review by the Loyalty Review Board appointed by the President.

Under loyalty program rules, the employee cannot present evidence or argument attacking the inclusion of particular organizations in the Attorney General's list. The designation of organizations is not preceded by notice or hearing, and organizations listed are neither given opportunity to present evidence on their own behalf nor informed of the evidence upon which the designations rest. The method of designation of particular organizations has been said by the Attorney General to begin with compilation of available data and correlation of investigative reports of the Federal Bureau of Investigation. Then memoranda are prepared by Department of Justice attorneys, and high officials of the Department make recommendations to the Attorney General who after careful study approves the final listing.

The present litigation concerns challenges to the loyalty program in separate suits brought by three listed organizations. The Joint Anti-Fascist Refugee Committee, according to its complaint, is an unincorporated association engaged in relief work in aid of Spanish Republican refugees and derives revenues from public contributions obtained chiefly at meetings and social functions. The National Council of American-Soviet Friendship, Inc., a nonprofit membership corporation, alleges its purpose to be the strengthening of friendly relations between the United States and the Soviet Union by the development of cultural relations between the peoples of the two countries and dissemination in this country of educational materials about Russia. Its funds have been obtained through public appeals and collections at meetings. The International Workers Order, Inc., claims to be a fraternal benefit society operating under the lodge system. Members pay dues for general expenses and many of them make contributions beyond their dues for life and health insurance. The Workers Order allegedly attempts to encourage the preservation of the cultural heritage brought to this country by peoples from other nations.

The Attorney General designated these organizations as "communist." Each alleged substantial, irreparable injury as a consequence. Publicity and meeting places have become difficult to obtain, federal tax exemptions have been revoked and supporters and members have been lost, especially from among present or prospective federal employees. Each organization sought declaratory and injunctive relief.

The Government's motions to dismiss the complaints were granted in each instance by the District Court and the Court of Appeals for the District of Columbia Circuit affirmed. On certiorari, the Supreme Court reversed and employed six opinions totaling about eighty-five pages to express its conflicting views, no one of which attracted sufficient adherents to be a majority opinion. Mr. Justice Burton's opinion, which gave the judgment of the Court, was joined by Mr. Justice Douglas. Mr. Justice Black, Mr. Justice Frankfurter, Mr. Justice Douglas and Mr. Justice Jackson wrote separate concurrences. Mr. Justice Reed's dissenting opinion was joined by the Chief Justice and Mr. Justice Minton. Mr. Justice Clark, who was Attorney

General at the time of the President's Loyalty Order and who promulgated the challenged list of subversive organizations, did not participate.

The threshold question of petitioners' standing to bring suit, which was the subject of somewhat varied treatment by the majority Justices, was considered in greatest detail in Justice Frankfurter's opinion. Designation by the Attorney General had been alleged to work an immediate and substantial harm to the reputations of petitioners and to interfere with their opportunities to retain or secure present or prospective Government employees as members. Hence, Justice Frankfurter concluded that a challenge to standing could not be based upon the lack of finality of the Attorney General's action or upon the lack of directness of effect upon petitioners. Further, he pointed to authority supporting a litigant's standing to attack governmental action of a sort which, if taken by a private person, would create a judicially cognizable right of action. Here the types of injury claimed were said to be clearly actionable at common law, and consequently the controversy was regarded as amenable to the judicial process.

Beyond the issue of standing, there is considerable divergence in the opinions of the Justices voting for reversal. Justice Burton proceeded from the proposition that a motion to dismiss must be treated as admitting allegations of a complaint. Thus, he deemed the Attorney General to have admitted petitioners' express or implied allegations that they were not within any of the designated classifications of the Loyalty Order. Consequently, the Attorney General, for purposes of his motions to dismiss, was regarded as having admitted, in effect, that he arbitrarily and capriciously classified petitioners as "communist." Since Justice Burton saw no warrant for imputing to the President the decision to authorize such arbitrary action, he concluded that the Attorney General had admitted exceeding his authority.

Although Justice Frankfurter conceded the wisdom of dealing with constitutional controversies narrowly, he expressed his inability to read the pleadings in agreement with Justice Burton. He turned, therefore, to the questions petitioners raised under the Due Process Clause of the Fifth Amendment. While the Attorney General's designation itself imposes no legal sanction, Justice Frankfurter stated that, in the conditions of our time, listed organizations are drastically restricted by it without having been given opportunity to meet and refute the evidence upon which it may have been based. Even as against "the greatest of all public interests, that of national security," the traditions of fair play in a free society were thought to necessitate notice and hearing before the Attorney General could thus "maim or decapitate" an organization. Nothing was presented to the Court to indicate that it would be "impractical or prejudicial to a concrete public interest" to have even an informal administrative hearing. Indeed, Justice Frankfurter indicated that Congress must not have thought that the Attorney General's procedure was indispensable because the McCarran Act grants organizations full administrative hearings, subject to judicial review, before they are required to register as "Communist-action" or "Communist-front."

While accepting Justice Burton's views on standing and pleadings and Justice Frankfurter's Due Process Clause reasoning, Justice Black went even further. In his judgment the executive has no constitutional authority to prepare and publish the challenged list. The system adopted was regarded as effectively punishing many organizations and their members because of their political beliefs, contrary to Justice Black's interpretation of the limitations imposed by the First Amendment. Moreover, the Attorney General's list was considered to possess almost all of the qualities of a bill of attainder.

Justice Douglas' concurrence stressed that the requirements of a fair trial had not been met and that terms like "communist" were too indefinite to give sufficient notice of the standard for designation. He also emphasized the crucial impact of a disloyalty trial upon the life of the public servant. "If condemned, he is branded for life as a person unworthy of trust or confidence." As an example of the unfairness of the loyalty procedure, he referred to *Bailey v. Richardson* in which on the same day an equally divided court, Justice Clark not participating, affirmed the denial of a full hearing to an employee dismissed on grounds of disloyalty. The identity of the informants against Miss Dorothy Bailey was disclosed neither to her nor to the Loyalty Board, and their statements did not appear to have been made under oath. Pointing out that every Government employee must take an oath of loyalty, Justice Douglas concluded that both the spirit and the letter of the Bill of Rights were violated by the Loyalty Order which, in his view, substituted disloyalty charges for perjury charges and administrative boards for courts. Further, he saw no need for a "dragnet" loyalty procedure covering employees in all manner of posts.* He directed attention to the British approach of testing loyalty only for sensitive positions rather than for all public employment and transferring persons disqualified for secret posts to nonsecret departments.

In his concurrence, Justice Jackson, while recognizing that organizations would be injured by designation on the Attorney General's list, contended that the sanctions were applied by public disapproval and not by law. He maintained, however, relying on Justice Frankfurter's Due Process Clause reasoning, that it was a denial of due process as to Government employees charged with disloyalty not to permit either a listed organization or accused Government employees who are members to challenge the designation by the Attorney General. Since he regarded the Government as proceeding on the basis that the subversive purpose and intent of each of the

* It is of interest to note that, according to the New York Times of January 15, of the more than 2,000,000 Government employees covered by the Federal loyalty program, a total of 294 were discharged for disloyalty while 2872 quit while under investigation before final determination of their loyalty. In the cases brought before the loyalty boards, 8,371 employees were found loyal, and 522 initially found disloyal. It was of this latter group that 294 were discharged; 186 won their jobs back on appeal, and cases involving the remainder were still awaiting decision.

listed organizations could be attributed to and made conclusive upon its members, he thought that such organizations had standing to vindicate the rights of their members and object to the absence of a hearing prior to designation.

The dissenters, through Justice Reed, argued that the classification titles, "totalitarian, fascist, communist or subversive" in the Loyalty Order were qualified by the phrases immediately thereafter and meant organizations of the same general character as those which seek to alter our form of government by unconstitutional means, "to wit by force and violence." They differed with Justice Burton's reasoning on the pleadings in that they maintained that petitioners' allegations that they were not communist organizations were conclusions of law which were not admitted by motions to dismiss. The First Amendment claims asserted by petitioners were disposed of by the statement that listed organizations were in no different position from any proponent of unpopular views met with strong public expressions of opposition. As to due process, Justice Reed contended that petitioners were deprived of neither liberty nor property since they were not ordered to do anything or punished in any way. After pointing out that membership in a listed organization was not conclusive of disloyalty, he took the position that the requirements of due process were satisfied as to Government employees by the opportunity they had to explain their connections with such organizations. To permit continuous re-examination of the nature of these organizations was regarded as patently impractical.

In view of the narrow ground upon which Justice Burton relied, the validity of the Attorney General's list is still in doubt. Justice Burton may be satisfied by assertions and proof on the remand that the Attorney General in fact acted on the basis of information disclosed by investigation. If the Justice then agrees with the dissenters, the Court will be equally divided, as in the *Bailey* case, and a decision of the lower courts that the Due Process Clause does not require a hearing would be affirmed.

UNITED STATES V. PEWEE COAL COMPANY, INC.

Pewee Coal Company's properties were among those seized and operated by the Secretary of Interior for several months in 1943 on orders of the President designed to avert a nation-wide coal strike. Charging that it was entitled under the Fifth Amendment to just compensation for the seizure, Pewee sued in the Court of Claims to recover for operating losses sustained during the period of the Government's occupancy. The Court of Claims awarded compensation only for that small portion of the total operating losses which it found attributable to a wage increase granted by the Government in voluntary compliance with a War Labor Board decision. Pewee did not seek review, but on the Government's petition for certiorari the Supreme Court on April 30 affirmed by a vote of five to four. Although the Justices all agreed

that there had been a taking of property, no single expression of views won a majority of adherents.

Mr. Justice Black, who announced the judgment of the Court, was joined by Mr. Justice Frankfurter, Mr. Justice Douglas and Mr. Justice Jackson in his opinion for affirmance. These Justices acknowledged that ordinarily the measure of just compensation for temporary possession of a business enterprise without the owner's consent is the reasonable value of the property's use, but since Pewee did not claim such compensation they had only to consider the conceptually distinct matter of the Government's obligation for operating losses. On the latter issue, they agreed with Pewee's contention that the Government was required under the Constitution to bear such losses. Justice Black's opinion advanced the view that when the United States possesses and operates a private business for public use it succeeds to the position of any ordinary proprietor with respect to profits and losses. Although it was recognized that an express or implied agreement between the parties might vary this result, there was no indication that Pewee had consented to bear the loss due to the wage increase which was the only portion of the loss at issue.

In a separate opinion, the fifth member of the majority, Mr. Justice Reed, took the position that the Government should be charged only with the amount of operating losses attributable to its own acts. Since the War Labor Board's recommendation for a wage increase was not supported by sanctions, Pewee was entitled, in his view, to recover for losses occasioned by that increase. Mr. Justice Burton, writing for the four dissenting Justices, argued that Pewee had failed to prove that it could have operated without granting the increase, and therefore had shown no compensable loss. Thus, a majority of the Court rejected Justice Black's theory that the Government is liable for all losses during its period of operation. Pewee recovered here only because Justice Reed and the dissenters took opposite positions on whether the Government had acquiesced in an avoidable expense.

MOSSER V. DARROW

An important rule of trustee liability in reorganization proceedings was fashioned in this case decided May 7. In his capacity as reorganization trustee for two common law trusts, respondent had employed Kulp and Johnson to assist him in his policy of buying in for retirement purposes outstanding bonds of corporate subsidiaries of the trusts. These employees were hired with the express understanding that they could continue to trade in securities of the subsidiaries. This they did extensively during their employment, frequently buying bonds of the subsidiaries for their own account and reselling them to respondent at a profit. Included in such transactions were bonds purchased from bondholders who came to respondent's office to sell them to respondent. On respondent's retirement from the trusteeship, ob-

jection was made to his accounts by his successor, and, following the report of a special master, the District Court surcharged respondent approximately $43,000 on account of the foregoing conduct. The Court of Appeals reversed because there had been neither self-dealing nor actionable negligence on respondent's part.

The Court of Appeals was in turn reversed by the Supreme Court in an opinion by Mr. Justice Jackson. The decision indicated concern that to allow the practices followed would afford opportunities for devious dealings in the name of others that would not be permitted a trustee himself. No interest adverse to the trust would be tolerated in reorganization trusteeships, "not because such interests are always corrupt but because they are always corrupting."

The fact that respondent's operations had resulted in substantial gain to the trust was considered immaterial, since the trust obviously suffered to the extent of the employees' profits. Nor did it avail respondent that the special knowledge and concededly beneficial services of Kulp and Johnson were obtainable only on condition that they be permitted to engage in the criticized operations. The Court stated that if these employees' services were so indispensable as to warrant the irregular arrangement involved, respondent could have sought the approval of the District Court in advance, giving notice to creditors who might object. To the further contention that respondent was not guilty of negligence, the Court answered that liability was predicated not upon a negligent failure to detect the operations of Kulp and Johnson, but rather on the giving of blanket authority for them. Pointing out that personal liability is the most effective sanction for good administration, the Court similarly overruled respondent's argument that since he had not personally benefited he should not be penalized.

Mr. Justice Black dissented, substantially for the reason that in his view the rule of trustee liability propounded by the majority had no precedent and, however commendable, should not be applied retroactively to this respondent. Mr. Justice Burton did not participate.

The Association of the Bar of the City of New York

1870–1951

The first meeting of The Association of the Bar of the City of New York was held on the evening of February 1, 1870.[1] An unusually large attendance was gathered at the old Studio Building at Fifth Avenue and Twenty-sixth Street, and many of the outstanding members of the New York bar were called upon for the traditional "few chosen words." One after another, the legal giants of the day ascended the rostrum, and one after the other they asserted the needs of organization and association. But their words and thoughts were engulfed by the applause which greeted the statement of soon-to-be presidential candidate Samuel J. Tilden that the bar "must be bold in defense, and if need be, bold in aggression."[2]

Little attention was paid to the comments previously made by one of their leaders, Dorman B. Eaton. The task of selecting committees to nominate officers and draft by-laws was performed, and the meeting was adjourned until February 15, 1870. The bar had taken up the cudgels in the battle against the forces of corruption and patronage led by Boss Tweed—and all of New York was anxiously awaiting the skirmish which was sure to follow.

It came twelve days later. Mr. Eaton, a severe and outspoken critic of the political conditions of the day, was feloniously assaulted and left close to death. The Association of the Bar of the City of New York was quick to respond. Before the meeting of February 15th came to a close, the following resolution was proposed and adopted:

"WHEREAS, on Saturday, February 12th, an attempt was made on the life of Dorman B. Eaton, under circumstances which lead to the belief that the attempt was instigated by private malice:

"Resolved, That the Executive Committee of this Association be instructed to offer through the proper authorities a reward of $5,000 for the apprehension and conviction of the person or persons engaged in such attempt, to be paid on conviction."

But the big story of that meeting had little to do with the Eaton case, for his

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Editor's Note: This historical sketch, prepared for the Survey of the Legal Profession by Albert P. Blaustein, is published at the request of the Director of the Survey. Publication here does not imply approval by the Association of any statements made or views expressed therein. Two authorized histories of The Association of the Bar have been written—one in 1920 by Edward W. Sheldon, which was brought up to date in 1946 by Edward N. Perkins.

assailants escaped detection and the incident was soon forgotten. What has been remembered is the adoption of the Association's Constitution, which read in part as follows:

"The Association is established to maintain the honor and dignity of the profession of the law, to cultivate social intercourse among its members, and to increase its usefulness in promoting the due administration of justice."

This then was a major step forward in modern bar association history. A special committee was selected at the meeting to prepare an address for distribution to the legal profession through the state, describing the new organization and advocating the formation of similar associations. And it was The Association of the Bar that has been credited with stimulating the formation of the Chicago Bar Association and The Bar Association of the City of Boston and the New York State Bar Association.

"In its initial address to the bar in 1870 The Executive Committee had suggested in the public interest the foundation of similar associations in other cities and counties of the State, as well as the establishment of a State bar association. In direct response to this, the New York State Bar Association was chartered in 1877. In December, 1872, the lawyers of Chicago followed New York's example by forming the Chicago Bar Association. The Boston bar likewise, stimulated, etc. . . ." [3]

It was The Association of the Bar of the City of New York which William D. Guthrie has called "the premier association of its kind in every sense of that term," [4] and which Philip J. Wickser has categorized as "the model for the others." [5]

The first regular quarterly meeting of the Association was held during the following month, and an intense program of activity was under way. Several hundred new members were elected, a law library was begun, the constitution draft was approved and a club house was acquired. And a special committee was sent to the Governor to urge the appointment of three justices from other districts in the State to the General Term of the Supreme Court in the First Department.[6]

Before the committee could be heard, however, the Governor received a communication from Boss Tweed and designated three New York justices for the General Term. William M. Tweed had won the first round.

Boss Tweed and his Tweed ring also won Round Two. The Legislature refused to enact the articles of incorporation prepared by the Association and passed a materially different charter which, fortunately, the Governor did not sign. It was not until April 28, 1871 that the Association became a body corporate, "for the purposes of cultivating the science of jurisprudence, promoting reforms in the law, facilitating the administration of justice, elevating the standard of integrity, honor and courtesy in the legal profession, and cherishing the spirit of brotherhood among the members thereof."

From that time on, the battles against corruption resulted in victory after victory for the Association. In October, 1871, a special committee was

appointed to secure the nomination of suitable candidates for the bench, and the Association joined forces with the City's Committee of Seventy to fight for the reform candidates for the Legislature. The result: only one of the Ring nominees, Tweed himself, escaped defeat at the polls.

Another special committee was named in November of that year to prepare amendments to the Code and to other laws affecting judicial administration. And the Judiciary Committee was instructed to investigate the character and records of certain men on the bench. In January, 1872, the Judiciary group reported on the "general perversion of judicial powers, to evade justice and to accomplish unlawful ends" [7] which it had discovered, and recommended a Legislative investigation and the removal of three judges. The subsequent investigation led to the resignation of one judge, and the impeachments of two others during that year.[8]

An article in The New York Times set the pattern for the bar association activity which was to follow: "With Barnard's conviction the work of judicial reform has, to a certain extent, become a rounded whole. The Bar Association has accomplished what it undertook to do, and can address itself to the fresh tasks which invite its hand, with a new lease of public confidence, and with all the prestige of success." [9]

In the following year, however, an Association appeal and recommendation met with overwhelming defeat at the polls. The Association exerted all of its influence in behalf of a proposed Constitutional Amendment which provided for the appointment of all judges by the Governor, with the advice and consent of the Senate. The referendum resulted in a defeat of the Amendment and the retention of public elections for the New York judiciary.

The fight for improvements in the administration of justice continued—but victory was not always with the Association. The Association requested the removal of a Marine Court judge in 1880, but nothing was done by the Governor, and in September of that year the judge died. Charges against a Supreme Court justice were presented to the Legislature in 1886, and the Judiciary Committee of the State Assembly made a report exonerating the justice. The Assembly Committee did recommend an inquiry into the administration of justice in New York City, but the Legislature refused to act.

In 1892 the Association entered the struggle for the removal of a judge who had been appointed by the Governor to fill a vacancy in the Court of Appeals. Reason: the judge, as Deputy Attorney General in 1891, had been shown to have abstracted an election return. But again the Legislature refused to take action. However, in 1893, when this same judge was nominated for a full term of fourteen years, the Association threw its support behind his opponent, Edward T. Bartlett, a member of the Association since 1870. Result: the distinguished judicial career of the popular Judge Bartlett.

But the Association's efforts in behalf of a better judiciary have been preventative as well as curative. A special meeting was called in 1874 to protest against the nomination made by President Grant to fill the vacancy of Chief Justice of the United States, caused by the death of Salmon P.

Chase. Every Senator was presented with a copy of the action taken by the Association, and the original nomination was withdrawn. Morrison R. Waite was then named and confirmed as Chief Justice.

A Committee on Judicial Nominations was established in 1881 to consider the fitness of all candidates for judicial office. And while this committee has long since been supplanted by others having similar functions, the unwritten rules governing the Association's various judicial committees have remained the same: "... the Association should not involve itself in partisan politics ... except in case of emergency an attempt to obtain the nomination of particular persons (is) inexpedient ... where judicial officers had faithfully and ably discharged their duties, such officers should be re-elected." [10]

The Committee on Judicial Nominations was abolished in 1910 and its duties were transferred to the Judiciary Committee. It was this latter group which secured the renomination by both parties of Justices John Proctor Clarke and Samuel Greenbaum in 1915; of Judges Chester B. McLaughlin and Benjamin N. Cardozo in 1917; and of Justice Victor C. Dowling in 1918; and which has performed yeoman service in the Association's struggle to keep the bench out of politics.

Prior to the various judicial elections in the State of New York, the Committee interviews all nominees, with the exception of certain lower court candidates, and reports them to the Association as "well-qualified," "qualified" or "not qualified." The distinction between the "well-qualified" and "qualified" categories is based upon judicial experience; only those attorneys who have already served on the bench can be classified as "well-qualified." The Association then passes upon the reports of the committee and makes its findings available to the public.

The task of interviewing and screening candidates for the Municipal Court Bench is within the province of the Committee on the Municipal Court of the City of New York, while the Committee on Criminal Courts, Law and Procedure, upon the request of the Mayor, reports on judicial candidates for the Magistrates' Courts and the Court of Special Sessions.

Other committees vitally concerned with the work of the courts are the standing committees on the City Court of the City of New York, the Domestic Relations Court of the City of New York, Courts of Superior Jurisdiction, and the Surrogates Court and the special committee on the Unification of the Courts. The work of these groups is of prime importance. "Often, proposed legislation, including constitutional provisions, must be studied, and legislation sometimes has to be proposed. Calendar practice; expediting the disposition of causes; the possibilities and wisdom of pretrial procedure ... the City Court's future status and jurisdiction ... legislation altering the system of computing testamentary trustees' committees." [11]

With the exception of the various judiciary committees, the most important arm of The Association of the Bar has been the Committee on Grievances—one of the original committees formed in 1870. "It shall be the

duty of the Committee to consider and investigate the conduct of any member of the Association wherever he may be practising and of any other attorney practicing in any of the State Courts of the First Judicial District or in any of the Federal courts in the Southern District of New York . . . The Committee may itself initiate any investigation as aforesaid or may undertake the same upon complaint laid before it . . ." [13]

But in the early days of the Association, the powers given to the Committee were not deemed sufficient to include charges against non-Association members. And it was not until 1884 that a complaint against a member was made to the Committee. During that same year, an amendment to the by-laws authorized investigations into charges of fraud and gross un-professional conduct against lawyers who were not members of the Association, and against persons pretending to be lawyers. Amendment to the by-laws in 1896 and 1897 authorized the appointment of an attorney to the Committee, to serve without compensation. By 1906, however, it was necessary to employ a full-time salaried counsel, and the present Committee, which holds hearings every Tuesday, Wednesday and Thursday, except during the Summer, now has an attorney-in-chief and three assistant attorneys.

Broader powers were given to the committee in 1910, and in 1913 the Governor asked the Committee to investigate charges against a justice of the Supreme Court. The charges, however, were subsequently dismissed.

Here is how the Committee works: "Complaints brought to it are investigated and, where the facts seem to warrant it, charges are formulated, and those complained of are given opportunity for hearing. Trials are held; and where charges are sustained, the cases are reported to the Executive Committee. If approved for action, then the charges are presented to the court having jurisdiction which, in the case of members of the New York Bar, is the Appellate Division, First Department." [13] From 1905 to 1920, "more than eight thousand five hundred complaints against attorneys (had) been considered, and two hundred and sixty lawyers, in proceedings instituted by the Committee, (had) been disciplined by the Appellate Division by disbarment, suspension from practice or censure." [14]

The report of the Committee on Grievances for 1948-49 reads in part as follows:

"Of the 1,529 complaints which were before the Committee during the past year 54 were dismissed or ordered filed and 31 were recommended for prosecution, all after trials before the Committee, 9 were fully or partly tried and await final decision, 1,280 were dismissed or filed when the matters complained of were subsequently remedied or which upon investigation were found to be without merit or unsupported by sufficient proof and 155 are now pending litigation, further investigation or trial before the Committee . . .

"During the past year 71 meetings of the Committee have been held and 90 complaints involving 77 attorneys have been fully tried and hearings have been held in 4 additional cases. The Committee has submitted to the Executive Committee reports recommending that disciplinary proceedings be

instituted against 14 attorneys on 32 charges and has taken appropriate action on certificates showing the conviction of 2 attorneys of felonies . . .

"Proceedings instituted by the Association were disposed of by the Appellate Division as follows:

"Disbarred:

After trials before Referee	4
On certificates of convictions of felonies in courts of competent jurisdiction	2
Suspended	4
Censured	2
Proceedings dismissed	7
Total cases disposed of	19" [21]

At the present time the Committee investigates approximately 125 complaints a month—far more than were investigated during the early years of the Association, but far fewer than the 3,000 complaints received annually during the depression years of the 1930's. The activities of the Committee involve an expenditure of more than $40,000 a year—a cost borne almost entirely by the Association membership.

The history of the Grievance Committee—in its fight against the conduct of suits against the street railway companies, in its struggle against the evils of "ambulance-chasing," and in its battles against other unethical practices—has seen the Committee, not only as an efficient prosecutor, but as a group which has done much to elevate the standards of the legal profession.

Third of the original standing committees formed in 1870 was the Committee on the Amendment of the Law, whose work was described by an early bar association historian as "affirmatively" involving "the devising of needed additions to the existing statutes, and negatively the much greater task of criticizing and opposing the incessant attempts to enact undesirable laws." [22]

Highlight in the activities of this committee was the famous battle against the Field Civil Code—which resulted in victory for the Association, and for the New York Bar.

The year 1857 saw the appointment of David Dudley Field as one of the State commissioners on the codification of the law, and eight years later the proposed Code was submitted to the Legislature for enactment. It failed of legislative approval for many years but finally, in 1880, the Code was passed by both Houses—and then vetoed by the Governor.

When the bill was reintroduced in the legislative session of 1881, the Committee on the Amendment of the Law was instructed to consider the measure and report to the Association. The report pointed out the advantages of a careful revision of existing statutes, but submitted that any attempt to codify the entire body of the common law would be impracticable and of great damage to the general public. The report was adopted and a special

committee was directed to appear before the proper legislative committees to urge rejection of the proposed Code.

During the next 10 years the Association continued to wage its bitter battle against codification. Reports were printed and distributed throughout the State, special appeals were submitted to each legislator, and arguments were presented on numerous occasions before the Judiciary Committees of the Senate and Assembly. Despite the briefs of Prof. Theodore W. Dwight and James C. Carter, the representatives of the Association, the reports of the legislative committees frequently advocated the adoption of the Field Code. On several occasions the bill was passed by the Senate; on other occasions it was passed by the Assembly; and in 1882 it was passed by both Houses, but vetoed by the Governor. In 1888, the measure was defeated by a substantial majority in the Assembly and the Field forces finally bowed to defeat at the hands of the Association.

But the Committee on the Amendment of the Law (now the Committee on Law Reform) is only one of the many task forces in the Association's constant fight for better legislation—and the struggle against the Field Code is only one of the many battles fought by the various legislative committees.

The Committee on Federal Legislation was formed in 1906, the Committee on Law Reform in 1910, the Committee on Uniform State Laws in 1935, and the Committee on Labor and Social Security Legislation in 1944. And the legislative work of these committees have been supplemented by the efforts of the committees on Administrative Law, Admiralty, Aeronautics, Arbitration, Bankruptcy and Corporate Reorganizations, Copyright, Insurance Law, International Law, Medical Jurisprudence, Patents, Real Property Law, Taxation, and Trade Regulation and Trademarks.

During the session of the State Legislature, proposed statutes and constitutional amendments are submitted to the Committee on State Legislation and assigned to the Committee members for study and report. The reports are then considered by the whole Committee and, if approved, are printed in a special bulletin. *Every legislator receives a copy of this bulletin every Monday morning during the legislative sessions.*

The Governor's counsel is also advised of the Committee's approval or disapproval of proposed legislation and many recommendations and memoranda are supplied to various State officials requesting the advice and assistance of the Bar. The other committees of the Association, particularly the Committee on Taxation, contribute to the "bulletins," and to the recommendations and memoranda.

Other committees have also played important roles in the history of The Association of the Bar. The Committee on Courts of Inferior Jurisdiction was largely responsible for the creation of a commission on the reorganization of the New York Municipal Court system in 1924; the Committee on Federal Legislation took an active part in the fight against President Roosevelt's "court-packing" proposal in 1937. Still other committees initiated the investigation of the Magistrates' Courts in 1931 and 1932, and in 1935 helped

bring about the appointment of Thomas E. Dewey to fight organized crime in New York City.

The Association has also done important pioneer work in the field of legal education, the conduct and standards of law schools, and the rules regulating admission to the bar. Since 1935 the Committee on Post-Admission Legal Education (a standing committee since 1944) has sponsored more than fifty lectures and section conferences every year devoted to the study of such subjects as corporations, federal practice, labor law, taxation, trials, trusts, and administration of estates. And a section on the Drafting of Legal Instruments was initiated in 1942. Other active committees concerned with the work of elevating the standards of the profession are the Committee on Professional Ethics and the Committee on Unlawful Practice of the Law, both formed in 1925. The Committee on Junior Bar Activities (authorized in 1944) has also played an important role in the training of the younger lawyers.

Among the other important "arms" of the Association are the standing Committees on Legal Aid (1925) and Bill of Rights (1939), and the special committees on Improvement of the Divorce Laws (1948), Public and Bar Relations (1947), and Unification of the Courts (1948). Two additional committees, devoted to the establishment of the Lawyers Bureau (1947) and Legal Referral Service (1945), represent the joint efforts of The Association of the Bar and the New York County Lawyers Association. The work of these committees will be discussed in the third article of this series—an article on the history of the New York County Lawyers Association.

But the history of The Association of the Bar of the City of New York is more than the history of its committees and the story of its service to the public and to the legal profession. It is also the story of the 231 men who signed an agreement in December, 1869, to form an "association" of lawyers, and the story of the 4,858 men and women who now comprise the organization which was formed.

It is the story of the most "exclusive" membership of any bar association in New York City—a membership which was only 2,333 as recently as 1920—a membership far smaller than that of its lusty younger brother, the New York County Lawyers Association, which was founded in 1908, and whose roster now includes 7,166 attorneys.

For The Association of the Bar of the City of New York is unique in having a Committee on Admissions, as well as the traditional bar association Committee on Increase of Membership. Admission to the Bar is only one of the requirements for membership—every applicant must be proposed and seconded by existing members who "recommend the candidate on the basis of their personal knowledge of his character and qualifications as a desirable member of the Association." [17] Two letters of recommendation must be submitted, and the candidate must be interviewed and approved by members of the Committee on Admissions.

There are three main classes of membership in the Association. In order

to become an Active or Auxiliary member, the candidate must be a member of the New York Bar, in good standing, who lives at least three months of the year or has an office in New York City. Auxiliary members are those who have been admitted to the bar less than three years. Associate members are attorneys in good standing outside of New York City. The organization listed some 800 Associate members in 1950.

Dues in The Association of the Bar are high. "The admission fee for Active Members Class A shall be $100 and the Admission fee for Active Members Class B (New York City law teachers) shall be $50, except that members of the Bar of less than ten years' standing shall pay $25, and except that members of the Bar of less than ten years' standing who have theretofore paid aggregate dues of $50 or more as Auxiliary Members or for the House and Library privileges, shall pay no admission fee." Dues for Active Members, Class A, are $75 per year for those with more than ten years' standing at the Bar, and $25 per year for the younger attorneys. Active Members, Class B, pay $30 per year, while the annual dues of Auxiliary members are $25. No admission fee is required for Auxiliary members. The dues for Associate members range from $10 to $100 per year, depending upon such factors as residence and length of time spent in New York City.[18]

During the year 1948-49 the receipts from dues and admission fees came to $323,780.00, out of a total income of $415,216.00.[19] But the services of The Association of the Bar necessitates this large income.

The largest expenditure of the Association in 1948-49 was the $108,594.37[20] spent for the maintenance of the library—one of the largest law libraries in the United States.

The library was begun at the very first meeting of the Association, back in 1870. A "century fund" was provided by the contribution of $100 each by 100 of the new members, and, by 1873, six thousand volumes had been acquired. The collection totalled 38,762 books in 1892; 56,911 in 1903; and more than 129,000 in 1920. The library today numbers 271,952 volumes, 113,151 of them having been presented as gifts to the Association. The past year has seen the addition of 3,924 volumes to the collection.

One of the outstanding periodicals on the shelves of the library is "The Record," the Association's own monthly publication. In addition to such features as a calendar of events and several pages of valuable bibliography, each edition of "The Record" contains important committee reports and articles by outstanding members of the bench and bar. A Year Book, which includes information about the Association together with a complete membership list, is also published.

The Association has also made use of other communications media. Panel discussions on important legal issues are presented every Wednesday night on both radio and television. These programs, which have been entitled "On Trial," are telecast over WJZ-TV at 8:00 p.m. and are broadcast over WJZ at 10:30 p.m.

The first home of the Association was a private dwelling at 20 West 27th

Street in Manhattan, but it was not long before these quarters proved inadequate. A second and larger structure was acquired in 1875—together with an adjoining lot—located at 7 West 29th Street. But by 1880 it was necessary to erect a new three-story building on that lot to house the growing Association.

In 1894 the Executive Committee became convinced that the convenience of the members, the safety of the library, and the dignity of the organization demanded a larger and more substantial structure. Accordingly a plot of ground was purchased running through from 44th Street to 43rd Street, between Fifth Avenue and the Avenue of the Americas (then Sixth Avenue). Construction of the new bar headquarters was completed in 1896, bearing numbers 42 West 44th Street and 43 West 43rd Street. Two and one-half floors of the Bar Bulding, owned by the Association at 36 West 44th Street, are also used for various administrative offices of the Association.

But the most sensational story in the history of The Association of the Bar of the City of New York is a story apart from the growth of the organization and the activities of its committees. It is the story of the five Socialists who were elected to the New York State Assembly in 1920, and who were arbitrarily deprived of their legislative seats.

While the vast majority of the bar had little sympathy with the principles set forth in the Socialist platform, many members of the Association "saw a foul blow to representative government in the attempt to expel from the Legislature, because of their political opinions, duly elected representatives of the people."[21]

A special meeting was called, the issue was debated, and the Association adopted the following resolution:

"RESOLVED, that this Association is unalterably opposed to any action of the Assembly excluding from its membership because of affiliation with any political party, when seeking by constitutional and legal methods to bring about any change in our Constitution and law, any person duly elected to its membership; . . ."[22]

And heading the list of the thirty-five lawyers who signed the resolution were Charles Evans Hughes, Harlan Fiske Stone and Henry L. Stimson.

Justice Hughes led the fight for the reinstatement of the five legislators in the debates before the Assembly Judiciary Committee, but the House eventually sustained its earlier decision and the Socialists were denied their parliamentary privileges.

Summing up the record of The Association of the Bar of the City of New York, Chief Justice Stone had this to say:

"Recognizing that life itself is change, and that the law is rooted in life, the Association has been wisely progressive in meeting the manifold changes which, through the years, have affected the law, the courts, and the Bar. With it all, the Association has had no selfish aim. It has sought to promote no individual or Association interest which was not calculated to advance the best interests of the profession and the public."[23]

This is The Association of the Bar and this is the record that earned William D. Guthrie's description as "the premier Association," and Philip J. Wickser's characterization as "the model for the others."

FOOTNOTES

1. Much of the material contained in this article was obtained from the Historical Sketch, 1870–1920, prepared by Edward W. Sheldon for the Association's Semi-Centenary Celebration on February 17, 1920. (Hereinafter referred to as "Assn. Hist.")
2. Assn. Hist., page 43.
3. Assn. Hist., page 44.
4. "Bar Associations," address by William D. Guthrie before The Bar Association of the City of Chicago, 1926, 28 Assn. Rep. 8.
5. "Bar Associations," by Philip J. Wickser, 1930, 15 Cornell Law Q. 390, 396.
6. The First Department comprises New York and Bronx Counties.
7. Assn. Hist., page 50.
8. "Bar Associations—Their History and Their Function," by George W. Wickersham. Address by George W. Wickersham before the Chicago Bar Association, 1914, 11 Assn. Rep.
9. Assn. Hist., page 55.
10. Assn. Hist., page 65.
11. Edward N. Perkins, Esq., Historical Sketch of the Association, 1920–1946. Proceedings of a Special Meeting to Commemorate the Seventy-fifth Anniversary of The Association of the Bar of the City of New York, page 54.
12. By-Law XIII, sec. 15.
13. Perkins, *supra* note 10, at page 55.
14. Assn. Hist., page 75.
15. The Association of the Bar of the City of New York, Year Book, 1949, page 243.
16. Assn. Hist., page 79.
17. Regulations of the Committee on Admissions, V. See Year Book, 1949, page 170.
18. Constitution of The Association of the Bar of the City of New York, revised October 20, 1925, Article VIII. See Year Book, 1949, page 122.
19. Extracts from the Annual Report of the Treasurer for 1948–49. See Year Book, 1949, page 228.
20. Annual Report of the Library Committee for 1948–49. See Year Book, 1949, page 240.
21. Harlan Fiske Stone, remarks. Proceedings of a Special Meeting to Commemorate the Seventy-fifth Anniversary of The Association of the Bar of the City of New York, page 5.
22. Louis Waldman, remarks. Id. at page 29.
23. Stone, *supra* note 20, at page 12.

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LIST OF PUBLICATIONS
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"Oh that my words were now written!
Oh that they were printed in a book."

JOB. 19:23

It will be seen from the title that this list contains only the publications presented to the library by author members. From reviews and notices one learns that a great many more books and studies have been published by our members which should be added to our collection. As various libraries and other public agencies often rely on this Library for bibliographical information, it is hoped that author members will help in keeping the collection of their works as complete as possible.

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